Supreme Court, U.S.
FILED
DEC 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

88 No. 1014

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1988

---

BROTHERHOOD OF RAILWAY CARMEN,
DIVISION OF TRANSPORTATION•COMMUNICATIONS
INTERNATIONAL UNION,
*Petitioner,*

v.

CSX TRANSPORTATION, INC.,
*Respondent.*

---

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

---

WILLIAM G. MAHONEY *
JOHN O'B. CLARKE, JR.
HIGHSAW & MAHONEY, P.C.
Suite 210
1050 17th Street, N.W.
Washington, D.C. 20036
(202) 296-8500

*Attorneys for Petitioner*
*Brotherhood of Railway Carmen,*
*Division of*
*Transportation•Communications*
*International Union*

* Counsel of Record

Date: December 19, 1988

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS


| | | Page |
|---|---|---|
| APPENDIX A | *Brotherhood Railway Carmen, Division of Transportation•Communications International Union (TCU) v. CSX Transportation, Inc.*, 855 F.2d 745 (11th Cir. 1988) ..... | 1a |
| APPENDIX B | *Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees v. CSX Transportation, Inc.*, 662 F. Supp. 1409 (S.D. Ga. 1987) ..... | 11a |
| APPENDIX C | *CSX Corporation—Control—Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, F.D. No. 28905 (Sub-No. 22) and *Seaboard Air Line R.R. Co.—Merger—Atlantic Coast Line R.R. Co.*, F.D. No. 21215 (Sub-No. 4), decided June 8, 1988.... | 23a |
| APPENDIX D | Judgment in *Brotherhood Railway Carmen, Division of Transportation•Communications International Union (TCU) v. CSX Transportation, Inc.*, 11th Cir. No. 87-8466, entered September 19, 1988 ..... | 47a |
| APPENDIX E | Statutes Relied Upon ..... | 49a |

I. Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.* (Excerpts)

A. Section 11341(a), 49 U.S.C. § 11341(a)
B. Section 11343(a), 49 U.S.C. § 11343(a)
C. Section 11344(a), 49 U.S.C. § 11344(a)
D. Section 11347, 49 U.S.C. § 11347

II. Railway Labor Act, 45 U.S.C. § 151, *et seq.* (Excerpts)

A. Section 2 First, 45 U.S.C. § 152 First
B. Section 2 Seventh, 45 U.S.C. § 152 Seventh
C. Section 5 First, 45 U.S.C. § 155 First
D. Section 6, 45 U.S.C. § 156
E. Section 7 First, 45 U.S.C. § 157 First

TABLE OF CONTENTS—Continued

APPENDIX E—Continued Page

III. Rail Passenger Service Act of 1970, 45 U.S.C. § 501, *et seq.* (Excerpt)
A. Section 405(b), 45 U.S.C. § 565(b)

IV. 28 U.S.C. § 1337

APPENDIX F *In The Matter of Arbitration Between Brotherhood of Locomotive Engineers and Union Pacific Railroad Company and Missouri Pacific Railroad Company,* decided January 18, 1985 (Seidenberg, Neutral) ..... 57a

APPENDIX G Letter dated October 10, 1986 from L.W. McAlpine, BRC General Chairman to J.T. Williams, Director of Labor Relations, CSX ..... 68a

Letter dated October 15, 1986 from J.T. Williams, Director of Labor Relations, CSX to L.W. McAlpine and R. Utter, BRC General Chairmen.... 71a

Letter dated November 4, 1986 from L.W. McAlpine, BRC General Chairman to J.T. Williams, Director of Labor Relations, CSX ..... 73a

## APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

---

No. 87-8466

BROTHERHOOD RAILWAY CARMEN, DIVISION OF TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION (TCU),
*Plaintiff-Appellant,*

v.

CSX TRANSPORTATION, INC.,
*Defendant-Appellee.*

---

Sept. 19, 1988

---

Appeal from the United States District Court
for the Southern District of Georgia

---

William G. Mahoney, William J. Birney, Highsaw & Mahoney, Washington, D.C., for plaintiff-appellant.

Malcolm R. Maclean, Hunter, Maclean, Exley & Dunn, Savannah, Ga., James S. Whitehead, Sidley & Austin, Chicago, Ill., for defendant-appellee.

Before HILL and EDMONDSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

PER CURIAM:

Plaintiff-appellant Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees ("BRAC") commenced this lawsuit in federal district court seeking to enjoin defendant-appellee CSX Transportation, Inc. ("CSX"), a subsidiary of CSX Corporation, from implementing an arbitration award issued under procedures established by the Interstate Commerce Commission ("ICC").[1] The district court denied BRAC's motion for a preliminary injunction and cross-motion for partial summary judgment, it granted CSX's motion to dismiss or, in the alternative, for summary judgment. BRAC appeals from that order. We conclude that the district court lacked subject matter jurisdiction; we therefore vacate the order of the district court and remand with instructions that the case be dismissed for lack of subject matter jurisdiction.

The district court found the following to be the facts of the case:

> 1. The Interstate Commerce Commission, by order of September 23, 1980, approved an application of the CSX Corporation to acquire control of the railroad subsidiaries of Chessie System, Inc. ("Chessie"), and Seaboard Coast Line Industries, Inc. ("SCLI"). As a result of this transaction, CSX was the surviving partner of a merger between Chessie and SCLI. Chessie, until that time, had controlled the Chesapeake and Ohio Railway Company ("C & O"), which operated a heavy freight car repair shop at Raceland, Kentucky. At that time, SCLI controlled the Seaboard Coast Line Railway Company ("Seaboard"), which then operated its heavy freight car

---

[1] In order to avoid potential confusion, we wish to clarify that, consistent with the district court's order, we refer to the subsidiary corporation, CSX Transportation, Inc. as "CSX" rather than as "CSXT" as it was referred to by the parties in brief and at oral argument.

repair shop at Waycross, Georgia. The ICC authorized Chessie and SCLI to merge into CSX, while their individual railroad subsidiaries, such as C & O and Seaboard, were to remain separate corporate entities. In order to protect carrier employees affected by the consolidation, "as well as those who may be affected in the future, but are not now identified specifically," the ICC imposed the so-called *"New York Dock"* conditions. Employees affected by actions of their employer taken pursuant to the ICC's authorization are entitled to the protections embodied in the *New York Dock conditions. CSX [Corporation] —Control—Chessie [System, Inc.,] and Seaboard [Coast Line Industries, Inc.]*, 368 I.C.C. 521 (1980); *see also New York Dock Ry. v. U.S.*, 609 F.2d 83 (2d Cir.1979).

2. Article I, Section 4(a) of the *New York Dock* conditions provides that a carrier proposing to take an action pursuant to the ICC's authorization that may cause the dismissal or displacement of its employees must give its employees at least 90 days written notice. If the parties are unable to reach agreement on the implementation of the proposed action, either party may submit the dispute to binding arbitration before a neutral referee.

3. On August 29, 1986, CSX served a formal notice under Article I, Section 4 of the *New York Dock* conditions that it intended to close the Waycross heavy repair shop and transfer the employees and the work that otherwise would be performed there to the [C & O] heavy repair shop in Raceland, Kentucky. The notice stated that 149 job positions at Waycross would be abolished (121 occupied by BRAC members) and that 107 new job positions would be created at Raceland (99 in crafts represented by BRAC) to perform the work that would be transferred from Waycross. Thus, the notice in-

formed BRAC that the Waycross shop would be closed and that, by January of 1987, 22 BRAC-represented jobs would be lost.

4. After attempts to negotiate an implementing agreement on the transfer were unsuccessful, BRAC requested on October 10, 1986 that the dispute be referred to binding arbitration under the *New York Dock* conditions, as well as under a provision of a collective bargaining agreement governing Seaboard employees who were employed in 1967. That agreement, due to the color of its cover, is known as the "Orange Book" agreement. On October 15, 1986, CSX also called for arbitration under the *New York Dock* conditions. BRAC later challenged the applicability of the *New York Dock* conditions, contending in a letter of November 2, 1986, that the closing of the Waycross shop and the transfer to Raceland had not been authorized by the ICC in the *CSX—Control* case and, therefore, were not subject to compulsory arbitration under the *New York Dock* conditions.

5. On December 17, 1986, BRAC filed this action for declaratory judgment and injunctive relief, alleging that the closing of the Waycross shop and transfer of the work to Raceland, Kentucky, constituted a unilateral modification of existing rules and working conditions in violation of the Railway Labor Act ("RLA"), 45 U.S.C. §§ 152 Seventh and 156. BRAC also sought a declaratory judgment that CSX's attempt to effectuate the transfer through compulsory arbitration violated the arbitration procedures set forth in § 157 First of the RLA. Finally, BRAC sought preliminary and permanent injunctive relief to protect employees from harm pending exhaustion of the mandatory notice, negotiation and mediation procedures of the RLA. 45 U.S.C. § 155-157, 160.

6. On December 18, 1986, a hearing was held before the arbitration committee pursuant to the *New York Dock* conditions. CSX and BRAC addressed a variety of issues to the committee, including: whether the transfer could be undertaken pursuant to the ICC's authorization; whether CSX had given BRAC sufficient notice of the transfer; whether the Seaboard employees protected by the "Orange Book" could be transferred off of Seaboard property in alleged derogation of that agreement; whether the work covered by the Seaboard collective bargaining agreement could be made subject to a C & O agreement; and what the ultimate terms of an implementing agreement should be.

7. On December 26, 1986, CSX posted a notice that the jobs of 21 employees at the heavy repair shop in Waycross would be abolished effective January 2, 1987, and BRAC sought a temporary restraining order ("TRO") in this Court to enjoin the proposed job abolishments. The Court denied BRAC's request for a TRO following a hearing on December 31, 1986, and scheduled a hearing on BRAC's motion for a preliminary injunction on January 9, 1987.

8. At the hearing on January 9, 1987, CSX presented evidence that the furloughs of January 2, 1987, were not caused by the impending shop transfer but, rather, were a result of a decline in the amount of available work scheduled for Waycross in 1987. BRAC showed that CSX failed to provide specific information in August of 1986 as to the nature of the work that was intended to be transferred to Raceland. Representatives of CSX testified that the decision to close the Waycross shop was made pursuant to a variety of considerations, including the following: that CSX's freight car repair costs are too high; that CSX has an overcapacity of repair facilities; and that the Raceland shop has superior

technical and commercial potential. The testimony also showed that the repair work projected as available for Waycross in 1987 would have necessitated a reduction in force regardless of the plan to transfer the work to Raceland. Although evidence demonstrated that CSX had dismantled much of the Waycross shop's machinery and office materials and loaded them onto railroad cars during December of 1986, CSX stated that it would not implement the transfer until it received a favorable decision from the arbitration committee granting CSX permission to implement the transfer. The evidence further demonstrated that some Waycross equipment had already been reassembled and put back into place and that a program of repair work to be performed in Waycross had begun. Finally, BRAC admitted that, if the arbitration committee rendered a decision favorable to BRAC, the need for a preliminary injunction would evaporate.

9. On March 23, 1987, the neutral member of the arbitration committee issued his decision, with both the union and the carrier representatives dissenting. The arbitrator found that, because the shop transfer was necessary to allow CSX to carry out the ICC-approved merger, it was exempt from the RLA. However, on finding that the transfer of the Orange Book employees was not necessary to the consummation of the merger, the arbitrator ruled the Orange Book-protected employees could not be compelled to accept positions in Raceland. CSX appealed this decision to the ICC on April 13, 1987; BRAC filed a cross-appeal on May 26, 1987.

10. On May 8, 1987, CSX filed a motion to dismiss or, in the alternative, for summary judgment addressing the merits of BRAC's complaint before this Court. After securing an enlargement of time in which to respond, BRAC responded to CSX's motion

and cross-moved for partial summary judgment on June 9, 1987.

11. BRAC came before the Court once again on June 1, 1987, seeking a TRO to enjoin the shop transfer. This time BRAC contended that, if the transfer were to be implemented while the appeal of the arbitrator's decision to the ICC was still pending, those Orange Book employees who elected to stay in Waycross would run the risk of losing the present opportunity to bid on jobs in Raceland. Although the arbitrator held that Orange Book employees could not be compelled to move to Raceland, CSX's appeal of that decision presented the risk that the ICC would hold the reverse to be true. Such a situation would force Orange Book employees to face a dilemma: if they elected to stay in Waycross, they would be taking the chance that the ICC would later rule they could be moved to Raceland at a time when the bidding on Raceland jobs was over and the jobs filled by other workers. At a hearing before the Court on June 2, 1987, CSX stated that it would hold open positions in Raceland for any Orange Book-protected employees who might later desire to bid on Raceland jobs in the event that the arbitrator's decision is reversed. The Court granted BRAC's request for a TRO for a period of 10 days to preserve the status quo pending disposition of the various motions.

District Court order of June 16, 1987, at 2-8, 662 F.Supp. 1409 (S.D.Ga.1987). The parties' appeal and cross-appeal to the ICC from the arbitration decision were decided by the ICC shortly before this case was orally argued in this court, although the decision was not served until after oral argument. *CSX Corporation—Control—Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, — I.C.C.2d —, Finance Docket No. 28905 (Sub-No. 22) and Finance Docket No. 21215 (Sub-No. 4) (decided June 8, 1988; served June 23, 1988).

While we do not dispute the district court's findings of fact, we must disagree with that court's conclusion that it had subject matter jurisdiction of this case. The district court found that it had jurisdiction under 28 U.S.C. §§ 1331 and 1337(a), 45 U.S.C. §§ 152 First, 152 Seventh, and 156, and 49 U.S.C. § 11341, having concluded that

> [t]he case presents the federal question of whether CSX's proposed transfer of the employees and work at the Waycross repair shop to Raceland, Kentucky, constitutes a violation of the Railway Labor Act, 45 U.S.C. §§ 152, First and Seventh, and 156; or whether the proposed transaction is exempt from the application of the RLA due to the ICC's exercise of its exemption power under the Interstate Commerce Act, 49 U.S.C. § 11341(a).

District Court Order of June 16, 1987, at 8. However, we agree with CSX that this action is an attempt by BRAC to bypass the appropriate procedures for review of the arbitration award. Congress has provided for exclusive jurisdiction in the Court of Appeals to review actions by the ICC. 28 U.S.C. §§ 2321(a), 2342(5). The arbitration opinion and award recognizes that it is authoritative only as an extension of the authority of the ICC. R.2-22-App. A, at 31. We agree with CSX that the present lawsuit is, in effect, a collateral attack on the arbitration award; it is an attempt by BRAC to have the district court set aside the arbitration award, rather than going through the normal channels of appeal to the ICC and then to the Court of Appeals. Based upon the exclusive jurisdictional grant to the Court of Appeals by Congress, we conclude that the district court lacks subject matter jurisdiction of this action.

Our decision does not totally preclude judicial review of this matter since, as noted above, the decision of the ICC is subject to direct review in the Court of Appeals. We believe our resolution of the case is consistent with

the apparent intent of Congress in enacting the jurisdictional statutes providing for review of ICC decisions, and we note that our conclusion is in accord with the decision in *United Transportation Union v. Norfolk and Western Railway Co.*, 822 F.2d 1114 (D.C. Cir. 1987), *cert. denied*, —— U.S. ——, 108 S.Ct. 700, 98 L.Ed.2d 651 (1988). *But see Railway Labor Executives Association et al. v. City of Galveston*, 849 F.2d 145 (5th Cir. 1988).

BRAC argues that the ICC is required by 49 U.S.C. § 11347 to protect employees' existing collective bargaining rights, and that the ICC lacks the authority to determine the effect of its orders upon other laws. While these considerations may be relevant to the merits of the ultimate decision, they are not dispositive of the question whether the district court had subject matter jurisdiction of the case.

BRAC points us to the decision in *City of Palestine, Texas v. United States*, 559 F.2d 408 (5th Cir. 1977), *cert. denied sub nom. Missouri Pacific Railroad Company v. City of Palestine, Texas*, 435 U.S. 950, 98 S.Ct. 1576, 55 L.Ed.2d 800 (1978) and to Justice Stevens' concurrence in *Interstate Commerce Commission v. Brotherhood of Locomotive Engineers*, —— U.S. ——, 107 S.Ct. 2360, 2370, 96 L.Ed.2d 222 (1987), as further support for the proposition that there are limits on the ICC's power. However, the subject matter jurisdiction of the district court was not at issue in those cases, so we do not find them to be dispositive of the issue presently before us.

BRAC also argues that the present action cannot be viewed as a collateral attack on the arbitration award because the ICC lacks the district court's authority to determine the effect of its orders on other laws, such as the RLA. While we recognize that the "collateral attack" analogy is not perfect, we find it instructive; furthermore, since the parties already have invoked the "direct

appeal" procedure, we find no injustice or inefficiency in leaving the resolution of the decision in that forum. If anything, precluding the "collateral attack" will lead to a more efficient resolution of cases like this one, by eliminating duplication of effort.

As we conclude that subject matter jurisdiction is absent, we need not reach the merits.

The order of the district court is VACATED and the case is REMANDED to the district court with instructions to dismiss for lack of subject matter jurisdiction.

**APPENDIX B**

UNITED STATES DISTRICT COURT
S.D. GEORGIA
BRUNSWICK DIVISION

---

Civ. A. No. 286-243

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, *Plaintiff*,

v.

CSX TRANSPORTATION, INC., *Defendant.*

---

June 16, 1987

---

William G. Mahoney, Washington, D.C., John R. Ferrelle, Brunswick, Ga., for plaintiff.

Malcolm R. Maclean, Savannah, Ga., James S. Whitehead, Chicago, Ill., for defendant.

ORDER

ALAIMO, Chief Judge.

In this action, the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees ("BRAC") seeks to enjoin defendant, CSX Transportation, Inc. ("CSX"), from closing its heavy freight car repair shop in Waycross, Georgia, and transferring the employees and repair work from Waycross to another shop located in Raceland, Kentucky. In es-

sence, BRAC contends that the shop transfer constitutes a change in the terms and conditions of employment for Waycross employees which may not be unilaterally imposed by CSX without complying with the mediation procedures required by the Railway Labor Act, 45 U.S.C. §§ 152 Seventh, 156 ("RLA"). Defendant has moved to dismiss or, in the alternative, for summary judgment on BRAC's complaint seeking a declaratory judgment and injunctive relief. In response, BRAC has cross-moved for partial summary judgment.

Since the Interstate Commerce Commission ("ICC") is empowered by 49 U.S.C. § 11341 to exempt certain transactions from "all other law . . . as necessary to . . . carry out the transaction," and since, in 1980, the ICC approved CSX's acquisition of control over the railroads which formerly had independently operated these repair shops, the Court is of the opinion that the shop transfer is exempt from the application of the RLA and, accordingly, BRAC is not entitled to the relief it seeks. Plaintiff's petition for a preliminary injunction will, therefore, be denied and the remainder of its complaint dismissed for failure to state a claim on which relief can be granted. In addition, plaintiff's cross-motion for partial summary judgment will be denied.

This case has taken a procedurally serpentine course and has required the application of distinct bodies of law which, at best, must be characterized as "in tension." The unusually complicated posture of this case and the unsettled nature of the applicable law merit a detailed explanation, which the Court will attempt to provide by way of the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The Interstate Commerce Commission, by order of September 23, 1980, approved an application of the CSX Corporation to acquire control of the railroad subsidi-

aries of Chessie System, Inc. ("Chessie"), and Seaboard Coast Line Industries, Inc. ("SCLI"). As a result of this transaction, CSX was the suriving partner of a merger between Chessie and SCLI. Chessie, until that time, had controlled the Chesapeake and Ohio Railway Company ("C & O"), which operated a heavy freight car repair shop at Raceland, Kentucky. At that time, SCLI controlled the Seaboard Coast Line Railway Company ("Seaboard"), which then operated its heavy freight car repair shop at Waycross, Georgia. The ICC authorized Chessie and SCLI to merge into CSX, while their individual railroad subsidiaries, such as C & O and Seaboard, were to remain separate corporate entities. In order to protect carrier employees affected by the consolidation, "as well as those who may be affected in the future, but are not now identified specifically," the ICC imposed the so-called *"New York Dock"* conditions. Employees affected by actions of their employer taken pursuant to the ICC's authorization are entitled to the protections embodied in the *New York Dock* conditions. *CSX —Control—Chessie and Seaboard C.L.I.*, 363 I.C.C. 521 (1980); *see also New York Dock Ry. v. U.S.*, 609 F.2d 83 (2d Cir. 1979).

2. Article I, Section 4(a) of the *New York Dock* conditions provides that a carrier proposing to take an action pursuant to the ICC's authorization that may cause the dismissal or displacement of its employees must give its employees at least 90 days written notice. If the parties are unable to reach agreement on the implementation of the proposed action, either party may submit the dispute to binding arbitration before a neutral referee.

3. On August 29, 1986, CSX served a formal notice under Article I, Section 4 of the *New York* conditions that it intended to close the Waycross heavy repair shop and transfer the employees and the work that otherwise would be performed there to the C & S heavy repair shop in Raceland, Kentucky. The notice stated that 149 job

positions at Waycross would be abolished (121 occupied by BRAC members) and that 107 new job positions would be created at Raceland (99 in crafts represented by BRAC) to perform the work that would be transferred from Waycross. Thus, the notice informed BRAC that the Waycross shop would be closed and that, by January of 1987, 22 BRAC-represented jobs would be lost.

4. After attempts to negotiate an implementing agreement on the transfer were unsuccessful, BRAC requested on October 10, 1986, that the dispute be referred to binding arbitration under the *New York Dock* conditions, as well as under a provision of a collective bargaining agreement governing Seaboard employees who were employed in 1967. That agreement, due to the color of its cover, is known as the "Orange Book" agreement. On October 15, 1986, CSX also called for arbitration under the *New York Dock* conditions. BRAC later challenged the applicability of the *New York Dock* conditions, contending in a letter of November 2, 1986, that the closing of the Waycross shop and the transfer to Raceland had not been authorized by the ICC in the *CSX—Control* case and, therefore, were not subject to compulsory arbitration under the *New York Dock* conditions.

5. On December 17, 1986, BRAC filed this action for declaratory judgment and injunctive relief, alleging that the closing of the Waycross shop and transfer of the work to Raceland, Kentucky, constituted a unilateral modification of existing rules and working conditions in violation of the Railway Labor Act ("RLA"), 45 U.S.C. §§ 152 Seventh and 156. BRAC also sought a declaratory judgment that CSX's attempt to effectuate the transfer through compulsory arbitration violated the arbitration procedures set forth in § 157 First of the RLA. Finally, BRAC sought preliminary and permanent injunctive relief to protect employees from harm pending exhaustion of the mandatory notice, negotiation and mediation procedures of the RLA. 45 U.S.C. §§ 155-157, 160.

6. On December 18, 1986, a hearing was held before the arbitration committee pursuant to the *New York Dock* conditions. CSX and BRAC addressed a variety of issues to the committee, including: whether the transfer could be undertaken pursuant to the ICC's authorization; whether CSX had given BRAC sufficient notice of the transfer; whether the Seaboard employees protected by the "Orange Book" could be transferred off of Seaboard property in alleged derogation of that agreement; whether the work covered by the Seaboard collective bargaining agreement could be made subject to a C & O agreement; and what the ultimate terms of an implementing agreement should be.

7. On December 26, 1986, CSX posted a notice that the jobs of 21 employees at the heavy repair shop in Waycross would be abolished effective January 2, 1987, and BRAC sought a temporary restraining order ("TRO") in this Court to enjoin the proposed job abolishments. The Court denied BRAC's request for a TRO following a hearing on December 31, 1986, and scheduled a hearing on BRAC's motion for a preliminary injunction on January 9, 1987.

8. At the hearing on January 9, 1987, CSX presented evidence that the furloughs of January 2, 1987, were not caused by the impending shop transfer but, rather, were a result of a decline in the amount of available work scheduled for Waycross in 1987. BRAC showed that CSX failed to provide specific information in August of 1986 as to the nature of the work that was intended to be transferred to Raceland. Representatives of CSX testified that the decision to close the Waycross shop was made pursuant to a variety of considerations, including the following: that CSX's freight car repair costs are too high; that CSX has an over-capacity of repair facilities; and that the Raceland shop has superior technical and commercial potential. The testimony also showed that the repair work projected as available for

Waycross in 1987 would have necessitated a reduction in force regardless of the plan to transfer the work to Raceland. Although evidence demonstrated that CSX had dismantled much of the Waycross shop's machinery and office materials and loaded them onto railroad cars during December of 1986, CSX stated that it would not implement the transfer until it received a favorable decision from the arbitration committee granting CSX permission to implement the transfer. The evidence further demonstrated that some Waycross equipment had already been reassembled and put back into place and that a program of repair work to be performed in Waycross had begun. Finally, BRAC admitted that, if the arbitration committee rendered a decision favorable to BRAC, the need for a preliminary injunction would evaporate.

9. On March 23, 1987, the neutral member of the arbitration committee issued his decision, with both the union and the carrier representatives dissenting. The arbitrator found that, because the shop transfer was necessary to allow CSX to carry out the ICC-approved merger, it was exempt from the RLA. However, on finding that the transfer of the Orange Book employees was not necessary to the consummation of the merger, the arbitrator ruled the Orange Book-protected employees could not be compelled to accept positions in Raceland. CSX appealed this decision to the ICC on April 13, 1987; BRAC filed a cross-appeal on May 26, 1987.

10. On May 8, 1987, CSX filed a motion to dismiss or, in the alternative, for summary judgment addressing the merits of BRAC's complaint before this Court. After securing an enlargement of time in which to respond, BRAC responded to CSX's motion and cross-moved for partial summary judgment on June 9, 1987.

11. BRAC came before the Court once again on June 1, 1987, seeking a TRO to enjoin the shop transfer. This time BRAC contended that, if the transfer were to be implemented while the appeal of the arbitrator's decision

to the ICC was still pending, those Orange Book employees who elected to stay in Waycross would run the risk of losing the present opportunity to bid on jobs in Raceland. Although the arbitrator held that Orange Book employees could not be compelled to move to Raceland, CSX's appeal of that decision presented the risk that the ICC would hold the reverse to be true. Such a situation would force Orange Book employees to face a dilemma: if they elected to stay in Waycross, they would be taking the chance that the ICC would later rule they could be moved to Raceland at a time when the bidding on Raceland jobs was over and the jobs filled by other workers. At a hearing before the Court on June 2, 1987, CSX stated that it would hold open positions in Raceland for any Orange Book-protected employees who might later desire to bid on Raceland jobs in the event that the arbitrator's decision is reversed. The Court granted BRAC's request for a TRO for a period of 10 days to preserve the status quo pending disposition of the various motions.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over this action under 28 U.S.C. §§ 1331 and 1337(a), as well as under 45 U.S.C. §§ 152 First, Seventh and 156, and under 49 U.S.C. 11341. The case presents the federal question of whether CSX's proposed transfer of the employees and work at the Waycross repair shop to Raceland, Kentucky, constitutes a violation of the Railway Labor Act, 45 U.S.C. §§ 152, First and Seventh, and 156; or whether the proposed transaction is exempt from the application of the RLA due to the ICC's exercise of its exemption power under the Interstate Commerce Act, 49 U.S.C. § 11341(a).

2. Under the Railway Labor Act, a covered employer may not "change the rates of pay, rules, or working

conditions of its employees . . . except in the manner prescribed in such agreements or in Section 6 of this Act." 45 U.S.C. § 152 Seventh. BRAC contends that the proposed shop transfer constitutes the kind of unilateral "major change" which requires compliance with the voluntary mediation and arbitration provisions in 45 U.S.C. § 156. *See Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U.S. 711, 723-24, 65 S.Ct. 1282, 1289-90, 89 L.Ed. 1886 (1945). Once a showing has been made that the employer and the union are engaged in a "major" dispute over a proposed change in working conditions, the Court has the power to issue an injunction to prevent either party from altering the status quo until the RLA mediation process has been exhausted. *Detroit & Toledo Shore Line Railroad Co. v. United Transportation Union*, 396 U.S. 142, 150, 90 S.Ct. 294, 299, 24 L.Ed.2d 325 (1969). CSX contends that the proposed transfer is not a "major" change and that, even if it were, the requirements of the RLA have been superseded by the Interstate Commerce Act, 49 U.S.C. § 11341(a), to the extent that such requirements interfere with the implementation of a transaction approved by the ICC.

3. The Interstate Commerce Act confers on the ICC the authority to approve transactions with the following effect:

> A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust law or any other law, including state or municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.

49 U.S.C. § 11341(a). In addition, whenever the ICC approves of a proposed transaction, the ICC must require the carrier to "provide a fair arrangement . . .

protective of the interest of employees who are effected by the transaction." 49 U.S.C. § 11347.

4. In its order of September 23, 1980, the ICC approved of CSX's acquisition of control of the railroad subsidiaries of Chessie and SCLI and imposed the *New York Dock* conditions to protect the interests of labor affected by the transaction. The 1980 ICC order stated that the approved transaction "will enable CSX to consolidate control of two railroad systems which geographically meet end-to-end, with minor exceptions, and will enable the operation of single-system service connecting the East and Midwest with the Southeast." *CSX Corp.—Control, supra* at 529. The ICC expected resulting employee displacements to be short term and to occur only at points "where the basically end-to-end systems meet." However, the ICC also found that future coordinations might well be necessary to effectuate the full implementation of the approved transaction. For example, the ICC stated: "It is certainly possible that as the two systems mesh their operations, additional coordinations may occur that could lead to further [employee] displacements." *Id.* at 589. The ICC ruled that the *New York Dock* conditions afforded employees adequate protections in the event of such future dislocations.

5. Invoking the *New York Dock* conditions, the parties entered into binding arbitration in order to reach an implementing agreement for the proposed shop transfer that would provide sufficient safeguards for the rights of affected employees. In his Opinion and Award of March 23, 1987, the neutral member of the arbitration committee, John B. LaRocco, found that the Raceland coordination "although not expressed in the control application . . . is an approved transaction exempt from the Railway Labor Act." Arbitration Committee Award at 33. The arbitrator further recognized that "the exemption is only triggered when necessary," that is, where the RLA or

the terms of existing collective bargaining agreements "thwart or substantially impede the approved transaction." *Id.*

6. Since BRAC contends that the proposed shop transfer violates the RLA, the Court must determine whether an exemption for the proposed shop transfer is "necessary to let [CSX] carry out the transaction." *I.C.C. v. Brotherhood of Locomotive Engineers, et al.*, —— U.S. ——, —— n.13, 107 S.Ct. 2360, 2377 n.13, 95 L.Ed.2d [222] (U.S. 1987) (Stevens, J., concurring), *citing* 49 U.S.C. § 11341(a). The broad scope of the control application approved by the ICC in this case, which foresaw the need for "additional coordinations" as the two systems "mesh[ed] their operations," supports a finding that an exemption from the requirements of the RLA is necessary to permit the shop transfer and thereby carry out the approved transaction.

7. Under the law of this Circuit, the ICC "exceeds the scope of its authority when it voids contracts that are not germane to the success of the approved . . . transaction." *City of Palestine, Texas v. United States*, 559 F.2d 408, 414 (5th Cir. 1977). The former Fifth Circuit, whose precedent binds this Court, reasoned that "Congress intended to empower the ICC to set aside state law restraints only insofar as necessary to assure the effectuation of the approved transactions." *Id.* at 415. This analysis comports with the interpretation of the Interstate Commerce Act adopted by Justice Stevens' concurring opinion in *I.C.C. v. Brotherhood of Locomotive Engineers, et al., supra*, an opinion which this Court considers dispositive of this case. Justice Stevens explained:

> [Section] 11341 [of the Interstate Commerce Act] automatically exempts a person from "other laws" whenever an exemption is "necessary to let that person carry out the transaction . . ." 49 U.S.C. § 11341. The breadth of the exemption is defined by

> the scope of the approved transaction, and no explicit exemption is required to make the statute applicable.

*Id.* at ——-——, 107 S.Ct. at 2375.

8. After a painstaking review of all the documents in the record, the Court is of the opinion that, without an exemption pursuant to 49 U.S.C. § 11341, CSX would be unable to implement the proposed shop transfer, and the ICC-approved transaction could not be fully carried out. A reading of the ICC's order granting approval to CSX's control application yields a clear intention on the part of the ICC to permit CSX to consolidate the control of the C & O and Seaboard railroads in order to provide "single system service." Providing such service would not be possible if shop transfers such as the one proposed here were effectively prohibited by the application of the RLA. Although the ICC could not foresee every conceivable coordination resulting from the merger that would result in the displacement of employees, it granted approval of the merger with the proviso that the *New York Dock* conditions be applied to any future dislocations.

9. Having concluded that the proposed shop transfer *is* necessary to effectuate the CSX merger approved by the ICC, the Court finds that this transfer was exempted by the ICC from the application of the RLA and the relevant collective bargaining agreements. With reference to the Orange Book agreement, the Court considers that the arbitrator's finding that the Orange Book employees may not be compelled to move to Raceland has rendered moot BRAC's request for injunctive relief as it relates to Orange Book employees. For the purposes of this Order, however, the Court concurs with the findings made by the arbitrator on the issue of whether the transfer of the Orange Book employees was "necessary" in order to implement the approved transaction.

CONCLUSION

In accordance with the preceding findings of fact and conclusions of law, BRAC's complaint for declaratory judgment and injunctive relief must be dismissed. Accordingly, BRAC's motion for a preliminary injunction and cross-motion for partial summary judgment are hereby DENIED. CSX's motion to dismiss or, in the alternative, for summary judgment is hereby GRANTED. The Clerk of the Court is directed to enter an appropriate judgment of dismissal.

## APPENDIX C

INTERSTATE COMMERCE COMMISSION

---

Finance Docket No. 28905 (Sub-No. 22)

CSX CORPORATION—CONTROL—CHESSIE SYSTEM, INC. and SEABOARD COAST LINE INDUSTRIES, INC.

---

Finance Docket No. 21215 (Sub-No. 4)

SEABOARD AIR LINE R.R. CO.—MERGER—ATLANTIC COAST LINE R.R. CO.

---

Decided: June 8, 1988

(Service Date June 23, 1988)

---

Arbitration award reversed in part.

### DECISION

BY THE COMMISSION:

On April 13, 1987, CSX Transportation, Inc. (CSX) and The Chesapeake and Ohio Railway Company (C&O) jointly filed a petition for administrative review of an arbitration committee's opinion and award in *Brotherhood Railway Carmen—A Division of BRAC* v. *CSX Transportation, Inc., and The Chesapeake and Ohio Railway Company* (LaRocco, March 23, 1987) (*BRC* v. *CSX*). The petition was filed in accordance with our decision in *Chicago and North Western Tptn. Co.—Abandonment*, 3 I.C.C.2d 729 (1987) (the so-called *Lace Curtain* decision).[1] There, we announced our appellate

[1] "Lace Curtain" refers to a moving allowance provided under Article I, section 9 of *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979), the decision setting forth labor protective conditions imposed in the cited abandonment proceeding.

jurisdiction over, and scope of review of, arbitration awards that involve disputes over Commission-imposed labor protective conditions. On May 26, 1987, the Brotherhood Railway Carmen, Division of Brotherhood of Railway & Airline Clerks (BRC) filed an answer and cross-complaint in response to the CSX/C&O petition.[2] On June 15, 1987, CSX and C&O filed an answer to BRC's cross-complaint.

The arbitration committee was convened under the labor protective conditions we imposed in the lead consolidation proceeding [*CSX Corp.—Control—Chessie and Seaboard Co. L. I.*, 363 I.C.C. 521 (1980) (*CSX-Control*)]. At issue is a dispute concerning CSX/C&O's plan to close a freight car heavy repair shop at Waycross, GA, and to transfer the functions and most of the employees of that facility to a repair shop at Raceland, KY. In *BRC* v. *CSX*, the arbitration committee directed the parties to adopt an implementing agreement governing the repair shop transfer. Under the implementing agreement, the Waycross facility would be closed and the work formerly performed at Waycross and the Waycross employees would be transferred to Raceland, except that employees entitled to the benefits under the so-called "Orange Book" agreement [a labor protective agreement negotiated between a CSX predecessor, Seaboard Coast Line Railroad Company (SCL), and its unions, including BRC] could not be compelled to transfer to Raceland. As described above, CSX then sought review of the award.

We have undertaken a full administrative review of this arbitration proceeding because it involves a dispute under the labor protective conditions imposed in *CSX-Control* and raises significant issues of general importance to that and other consolidation decisions. We are

---

[2] In *Lace Curtain, supra,* we stated that these petitions for administrative review should be treated as complaints because they allege that the arbitration decisions misconstrued the Interstate Commerce Act and our labor protective conditions.

reversing that part of the arbitration committee's decision that created an exception to its prescribed implementing agreement for Orange Book employees. This portion of the decision conflicts with the consolidation transaction authorized in *CSX-Control.*

## PRELIMINARY MATTERS

By decision served June 10, 1987, we denied BRC's May 22, 1987, request for a cease and desist order that sought to prevent CSX/C&O from implementing the repair shop transfer. We took under advisement BRC's embraced motion to dismiss CSX/C&O's petition for administrative review In support of its motion to dismiss, BRC argues that, because CSX/C&O have begun to implement the repair shop transfer under the arbitration committee's decision, they have accepted the decision and waived their right to challenge it.

We are denying BRC's motion to dismiss. CSX/C&O have not waived their right to appeal the arbitration committee's decision. Their petition challenges only the Orange Book employee exception imposed in the arbitration committee's decision. Even though CSX/C&O have held open a sufficient number of positions at the Raceland facility to accommodate Waycross employees covered by the Orange Book agreement, it is clear that CSX/C&O have taken these precautions only to allow them to institute the transfer without breaching their legal obligations under the Orange Book exception should they fail to have it reversed. Thus, CSX/C&O have not acquiesced in the committee's decision.

CSX/C&O request waiver of 49 CFR 1115.2(d), which limits the length of appeals to 30 pages. Part 1115 does not technically apply to this matter. In any event, most of the extra pages in the CSX/C&O petition consists of pertinent portions of the lengthy arbitration record, which is helpful to our review.

BRC challenges our jurisdiction to decide the CSX/C&O petition. It contends, *inter alia*, that CSX/C&O's August 29, 1986, notice to BRC of the proposed repair shop transfer was inadequate under the requirements of the labor protective conditions imposed earlier in this proceeding. BRC requests dismissal of the CSX/C&O petition or, alternatively, oral hearing on the notice issue based on new evidence that BRC obtained after the arbitration hearing.

BRC's request is denied. The arbitration committee considered the notice issue, and, in a letter to the parties dated March 23, 1987, Arbitrator LaRocca [*sic*] denied BRC's motion to reopen based on the same evidence. Consistent with the substantial deference we will accord arbitrators on fact-bound issues, we will not reweigh the evidence here. Even if this issue involves interpreting our labor protective conditions, as BRC contends, we are satisfied that the interpretation was not improper.

Finally, BRC further challenges our jurisdiction by arguing that Federal district courts have exclusive jurisdiction to review arbitration decisions under 49 U.S.C. 11795(a) [*sic*] [11705(a)] and that we may review the considered arbitration decision only by court referral. However, this argument was recently rejected in *United Transp. Union* v. *Norfolk & Western Ry.*, 822 F.2d 1114 (D.C. Cir. 1987), *cert. denied*, 108 S.Ct. 700 (1988) (*UTU* v. *N&W*), where the District of Columbia Circuit Court of Appeals affirmed the dismissal of a railroad union's appeal of an arbitration award issued under Commission-imposed labor protective conditions. The Court of Appeals found that such an award is an order of the Commission, which, if final, is reviewable only by the Court of Appeals and, if not final, is not ripe for judicial review. We made similar findings in *Lace Curtain* and described our scope of review for arbitration decisions. We found that arbitration decisions are not final as to issues within our described scope of review. *Lace Curtain*,

*supra*. We affirm those findings and reject BRC's contentions.

## BACKGROUND

In *Seaboard Air Line R. Co.—Merger—Atlantic Coast Line*, 320 I.C.C. 122 (1963) (*SAL—Merger—ACL*), we approved the consolidation of Seaboard Air Line Railroad Company (SAL) and Atlantic Coast Line Railroad Company (ACL), which later became SCL. The approval was subject to the labor protective conditions set forth in *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271 (1952), as modified in *Southern Ry. Co.—Control—Central of Georgia Ry. Co.*, 317 I.C.C. 557 (1962), 317 I.C.C. 729 (1963), and 320 I.C.C. 377 (1964) (*New Orleans*). Following our approval, and pursuant to the provision in former section 5(2)(f), now section 11347, permitting labor protection to be determined by agreement between rail carriers and employee representatives, SAL and ACL entered into the Orange Book agreement with BRC and 16 other unions. Under section 2 of the Orange Book agreement, all SAL and ACL employees were to be hired by SCL and receive so-called "attrition" labor protections. Under these protections, the employees would not be placed in a worse position with respect to compensation, rules, working conditions, fringe benefits, or related rights or privileges for their working lives. In exchange for these protections, SCL was entitled, under section 3(a) of the Orange Book agreement, to transfer the work of employees throughout the consolidated SCL system, and the parties were to enter into implementing agreements providing for the transfer and use of employees and allocation or rearrangement of forces made necessary by changes for which protection was provided.

In *CSX-Control*, *supra*, we approved CSX Corporation's application to control two non-carrier holding companies, the Chessie System, Inc., and Seaboard Coast Line Industries, Inc. (SCLI). Chessie controlled two

major railroads, C&O and the Baltimore and Ohio Railroad (B&O), and SCLI controlled SCL. The railroad subsidiaries remained separate entities.[3] *Id.* at 575. The approval was subject to the so-called *New York Dock* labor protective conditions [*New York Dock Ry.—Control—Brooklyn East Dist.*, [3]60 I.C.C. 60 (1979)].[4]

On August 29, 1986, CSX/C&O issued written notice to BRC of their intent to close CSX's Waycross car repair facility and simultaneously to transfer the functions of that facility to the C&O's Raceland freight car heavy repair shop. The notice stated that work moved from Waycross would be ". . . coordinated with such work presently being performed at Raceland under the C&O Agreement." Approximately 50 percent of the employees currently occupying positions at the Waycross repair shop would be covered by the Orange Book Agreement.

In their notice, CSX/C&O informed BRC of their intent to abolish 149 positions at Waycross and establish 107 positions at Raceland. BRC represents 121 of the incumbents holding positions slated for abolition. By class, the BRC incumbents are 99 carmen, 4 carmen helpers, 13 painters, and 5 painter helpers. With regard to these classes, CSX/C&O estimated that it would create positions for 86 carmen, 3 carmen helpers, 6 painters, and 4 painter helpers to perform the work transferred to Raceland from Waycross. As to other classes of in-

---

[3] On December 29, 1982, SCL merged with the Louisville and Nashville Railroad Company to form the Seaboard System Railroad, Inc. (SSR). On July 1, 1986, SSR changed its name to CSX Transportation, Inc. (CSXT). Subsequently, B&O was merged into C&O, which in turn was merged into CSXT on August 31, 1987. *See* Finance Docket No. 31106, *Chesapeake & Ohio Ry. and CSX Transp., Inc. Merger Ex.* (not printed), served September 18, 1987.

[4] *New Orleans* and *New York Dock* provide similar protections for affected employees and similar dispute resolution remedies, including arbitration.

cumbents at Waycross, CSX/C&O indicated that they would abolish 3 clerical positions, 11 blacksmith positions, 6 laborer positions, 3 machinist positions, 4 sheet metal worker positions and 1 electric crane operator position. At Raceland, the carriers intended to establish only 1 clerical, 4 blacksmith and 3 laborer positions. CSX/C&O estimate that, under the arbitration committee's decision prohibiting the transfer of employees subject to the Orange Book Agreement, it could not require 57 Waycross carmen to transfer to Raceland.

After CSX/C&O served the August 29, 1986, notice, the parties conferred at least twice to negotiate an implementing agreement. Their bargaining efforts were unsuccessful, primarily because of disagreements over the application of certain Orange Book provisions, the interrelationship between the Orange Book and a *New York Dock* implementing agreement, and CSX/C&O's right to implement the transaction without first complying with the Railway Labor Act, 45 U.S.C. 151 *et seq.* (RLA). Thereafter, BRC and later CSX/C&O invoked arbitration in accordance with Article 1, section 4(a) of the *New York Dock* conditions and section 4 of the Orange Book agreement.

The arbitration committee found that the repair shop transfer is a transaction subject to the *New York Dock* conditions imposed in *CSX-Control* because the transfer is an action taken pursuant to our control authorization within the meaning of Article 1, section 1(a) of *New York Dock*. *See BRC* v. *CSX*, *supra*, at 29-30. The committee derived its authority to impose an implementing agreement for the repair shop transfer under section 4(a) of *New York Dock*, which requires that "any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4." *Id.* at 30. The committee recognized that, because it derived its authority from the *New York Dock* conditions we imposed in *CSX-Control*, it was

a quasi-judicial extension of the Commission and therefore bound to follow our pertinent interpretations of the Interstate Commerce Act. *Id.* at 31. The committee then considered the Commission's views on the conflict between (1) the requirement in Article 1, sections 2 and 3, of the *New York Dock* conditions that rights under existing collective bargaining agreements be preserved; and (2) the authority of an arbitrator under Article 1, section 4, of *New York Dock* to authorize reassignment of employees in order to carry out the approved transaction. The committee found the Commission's view to be that the arbitrator could override provisions in collective bargaining agreements if they conflict with implementation of the transaction. *Id.* at 33. The committee also considered the conflict between the Railway Labor Act's (RLA) extended dispute resolution mechanism for altering agreements and the final and binding effect of arbitration under section 4 of *New York Dock* permitting prompt changes in working conditions. The committee found that RLA procedures were overridden by the *New York Dock* procedures. It relied on expressions of the Commission's views in decided precedent and in Commission pleadings, as well as the exemptive effect of section 11341(a). Accordingly, despite a perceived conflict between the Orange Book agreement and the carrier's proposal, the committee found that it had "jurisdiction to formulate an implementing agreement governing the transfer of work and employees from Waycross to Raceland." *Id.* at 34. This statement that it had the authority to override existing agreements by requiring the work and employees to be moved summed up the committee's view of Commission policy on this issue. It also acknowledged our decisions holding that, under the immunity provisions of 49 U.S.C. 11341(a), implementation of transactions that we authorize under 49 U.S.C. 11343, such as *CSX-Control*, supersede employee protections under the RLA and collective bargaining agreements that conflict with those

transactions.[5] *See* Finance Docket No. 30,000 (Sub-No. 18), *Denver and Rio Grande Western Railroad Company—Trackage Rights—Missouri Pacific Railroad Company Between Pueblo, CO and Kansas City, MO, et al.* (not printed), served October 25, 1983. (*DRGW*), *rev'd sub. nom. Brotherhood of Loc. Engineers.* v. *ICC*, 761 F.2d 714 (D.C. Cir. 1985), *rev'd on other grounds*, —— U.S. —— (June 8, 1987); and Finance Docket No. 30532, *Maine Central R.R. Co. Georgia Pacific Corp., Canadian Pacific, Ltd. and Springfield Terminal Ry. Co.—Exemption from 49 U.S.C. 11343* (not printed), served September 13, 1985 (*Maine Central*), *aff'd mem. sub nom. Railway Labor Execs. Ass'n* v. *ICC*, No. 85-1636 (D.C. Cir. Mar. 16, 1987).

The arbitration committee nevertheless held that the repair shop transfer should "reasonably accommodate" existing collective bargaining agreements and collective bargaining rights as well as existing merger protection agreements. *BRC* v. *CSX*, *supra*, at 33-34. The committee interpreted section 3(a) of the Orange Book agreement as barring CSX/C&O from transferring Orange Book protected *employees* or their *work* beyond former SCL property. It reasoned that the merging carriers could have foreseen that SCL might later become part of

---

[5] Section 11341(a), as pertinent, reads as follows:

> The authority of the Interstate Commerce Commission under this subchapter is exclusive. A carrier or corporation participation in or resulting from a transaction approved by or exempted by the Commission under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other laws, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction. * * * *

an even larger system. Thus, the drafters of the Orange Book could have easily written terms permitting unrestricted transfers across any enlarged system. *Id.* at 35-36. The committee recognized, however, that under *DRGW*, the Orange Book limitation on the transfer of work must be subordinated to CSX/C&O's right to engage in the authorized *New York Dock* transfer transaction. Otherwise the carriers would be effectively prevented from implementing the repair shop transfer. *Id.* at 36-37. Despite this, however, the committee refused to relieve CSX/C&O from the restriction against transferring Orange Book protected employees beyond SCL property. The Committee found that this limitation would only "slightly impair" the transaction while preserving the essence of the Orange Book agreement as required under sections 2 and 3 of the *New York Dock* conditions.[6]

---

[6] *New York Dock* sections 2 and 3 read as follows:

> 2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.
>
> 3. Nothing in this appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employee may have under any existing job security or other protective conditions or arrangements; *provided*, that if an employee otherwise is eligible for protection under both this appendix and some other job security or other protective condition or arrangement, he shall elect between the benefits under this appendix and similar benefits under such other arrangement and, for so long as he continues to receive such benefits under the provisions which he so elects, he shall not be entitled to the same type of benefit under the provisions which he does not so elect; provided further, that the benefits under this appendix, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits; and, *provided further*, that after

CSX/C&O contend that the arbitration committee's Orange Book employee exception may not stand because it conflicts with proper implementation of the repair shop transfer and our consolidation authorization in *CSX-Control.* They also argue that the Orange Book exception is based on a misinterpretation of the Orange Book agreement.

BRC contends that the repair shop transfer is not a transaction contemplated in *CSX Control* and, thus, not authorized under section 11343. Consequently, BRC contends that the arbitration committee exceeded its authority by allowing CSX/C&O to transfer the repair shop work at Waycross to Raceland beyond the SCL system, thus unilaterally abrogating the Orange Book agreement. BRC also argues that, even if the transaction were authorized by *CSX Control,* the committee impermissibly overrode sections 2 and 3 of *New York Dock* which require the preservation of collective bargaining agreements such as the Orange Book.

## DISCUSSION AND CONCLUSIONS

The starting point in our review of an arbitration decision is the appropriate standard of review to be applied by us. *See* discussion of these standards in *Lace Curtain,* 3 I.C.C.2d at 735-36, and our recent decision in F.D. No. 28490 (Sub-No. 1), *Atlantic Richfield Company and Anaconda Company—Control—Butte, Anaconda & Pacific Railroad Company* (not printed), served March 2, 1988 (*ARCA*), slip op. 6-7. A principal reason for starting with the standard of review is that much of our task can be ended there as well. As we indicated in *Lace Curtain,* 3 I.C.C.2d at 735-36, we do not propose to de-

---

expiration of the period for which such employee is entitled to protection under the arrangement which he so elects, he may then be entitled to protection under the other arrangement for the remainder, if any, of this protective period under that arrangement.

vote significant Commission time or resources to the review of an arbitrator's decision. We will employ an extremely limited standard of review, according substantial deference to the arbitrator's competence and special role in resolving labor disputes and giving a strong presumption of finality to an award. Our deference to the arbitrator's decision will vary with the nature of the issue involved, ranging from the most deferential treatment in the case of evidentiary issues such as causation, *Lace Curtain*, 3 I.C.C.2d at 736, *ARCA* at 9, to significantly less deference when reviewing interpretations of Commission regulations or orders and matters of transportation policy. *Id.*

Applying these standards to this case, we accord substantial deference to the arbitration committee's causual [*sic*] determination that the Waycross-Raceland transfer is a transaction authorized by the Commission's approval in *CSX-Control*. *BRC* v. *CSX* at 33. *Cf. ARCA* at 8-10. The Committee applied the proper standards in arriving at the determination, *BRC* v. *CSX* at 29-33, and we decline to re-examine it. Accordingly, the arbitration committee also properly determined that the *New York Dock* conditions imposed by us in *CSX-Control* are applicable to employee dislocations caused by the Waycross-Raceland transfer.

Having found that the *New York Dock* conditions apply, the next major task for the committee was to explore the relationship between the absolute authority given the committee by section 4 of those conditions to effect changes in work and employee assignments through the implementing agreement, on the one hand, and, on the other, the preservation of collective bargaining agreements and rights (including Orange Book rights) under sections 2 and 3 of those conditions and the dispute resolution procedures under the Railway Labor Act. The committee recognized that its views on this issue, a significant question of interpretation of a Commission order

and policy, were entitled to no deference upon review by this Commission. This is evident when it stated (p. 31), "as a quasi-judicial extension of the ICC, this committee must strictly follow the ICC's interpretation of its own authority." As we have described above (p. 4), the committee found that it was empowered to override collective bargaining rights, such as those in the Orange Book, and RLA rights in formulating the implementing agreement. Believing it had the authority to move both work and employees to Raceland, despite potentially conflicting provisions in the RLA and the *New York Dock* conditions themselves ("the ICC has emphasized that a transaction hurdles all legal obstacles preventing implementation," award at 34). This is a correct statement of our position and we affirm the committee's finding on its authority.

The committee went on, however, to contradict its own statements and imposed a significant, if not insurmountable, obstacle to implementation of the transfer by prohibiting the reassignment of SCL employees to Raceland. This decision of the committee rests on an interpretation of the Commission's conditions and is a matter of Commission policy. As such, it is not entitled to deference. We find its ruling on this issue to be "egregious error," *Lace Curtain*, 3 I.C.C.2d at 735, and accordingly reverse the committee and remand the proceeding to them for further proceedings in accordance with this decision. While finding that the Orange Book provision on transfer of work "must be subordinated to the Carrier's right" to carry out the authorized transaction (pp. 36-37), the committee inconsistently, we believe, failed to give the same effect to the limitation on transfer of workers contained in the same provision. On its own, the committee fashioned a standard of "slight impairment of the transaction" (p. 37) for permitting a provision of a collective bargaining agreement to conflict with the implementation of an approved transaction, contradicting the ICC standard given by the committee at p. 34. The standard applied by the committee would effectively undercut the Commis-

sion's authorization of the transaction here. As we will discuss below, we cannot affirm the committee on this issue.

As we indicated, even if the committee did properly interpret the Orange Book as prohibiting the transfer of employees outside former SCL limits, its attempted "accommodation" of this supposed prohibition to the proposed transaction must be overturned because the Orange Book agreement as interpreted by the committee serves as an impediment to implementation of a transaction authorized by the Commission. Once it is determined that a proposed transaction is authorized by the Commission (and we have affirmed the committee's finding that this transfer of repair work was authorized in *CSX-Control*), the carrier is permitted to carry out and fully implement the transaction despite potential impediments in existing agreements upon compliance with the provisions for the protection of the rights of employees contained in *New York Dock* or imposed by the Commission upon the involved tranaction. As the committee found, and we agree, it has the authority to override these obstacles in the implementing agreement it will fashion. As a matter of Commission policy and as an interpretation of our conditions, we are constrained to overturn the decision to the extent it holds that CSX may not require transfer of SCL employees as well as work from Waycross to Raceland. Such transfers are of course subject to the terms set forth in *New York Dock* for the protection of the interests of affected employees.

In any event, the evidence does not support the committee's conclusion that a prohibition against transfer of Orange Book protected employees will only "slightly impair" the implementation of the repair shop transfer. The record shows that CSX/C&O is consolidating its heavy car repair operations at Raceland because of significantly reduced work and the need commensurately to reduce its repair operations and realize cost savings and operational efficiencies. The unrebutted evidence shows

that CSX/C&O propose to establish a total of 107 positions at Raceland, including 86 carmen positions. Of the 86 Waycross carmen who are eligible for those positions, 57 are entitled to Orange Book protection. Under the arbitration committee's construction of the Orange Book, those 57 Waycross employees (over 55 percent of the proposed Raceland work force) can refuse to accept positions at Raceland. In support of its refusal to supersede the construed Orange Book prohibition, the arbitration committee concluded (*BRC* v. *CSX*, at p. 37), that some of those employees could exercise seniority to remaining positions at Waycross. However, the carriers state that, after the transfer of work, there will be no existing positions at Waycross to which these 57 carmen can exercise seniority to fill. Imposition of an Orange Book employee exception would effectively prevent implementation of the proposed transaction. We need not speculate on precisely what amount of interference with implementation of an authorized transaction is permissible. The interference here is too great.

This action will not significantly affect either the quality of the human environment or energy conservation.

*It is ordered*:

1. The opinion and award in *BRC* v. *CSX* is affirmed in part and reversed in part as described in this decision. It is remanded to the arbitration committee for further proceedings consistent with this decision.

2. This decision is effective on the date served.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Sterrett, Simmons, and Lamboley. Commissioner Lamboley dissented and will submit a separate expression at a later date.

NORETA R. MCGEE
Secretary

(SEAL)

Finance Docket No. 28905 (Sub-No. 22)

CSX CORPORATION—CONTROL—CHESSIE SYSTEMS, INC., AND SEABOARD COAST LINE INDUSTRIES, INC.

---

Finance Docket No. 21215 (Sub-No. 4)

SEABOARD AIR LINE R.R. CO—MERGER—
ATLANTIC COAST LINE R.R. CO.

---

June 27, 1988

(Service Date June 30, 1988)

---

NOTICE TO THE PARTIES:

A decision by the Commission, decided *June 8, 1988*, and served June 23, 1988, stated that Commissioner Lamboley dissented and would submit a separate expression at a later date.

Attached is the separate expression of Commissioner Lamboley.

KATHLEEN M. KING
Acting Secretary

Attachment

Finance Docket No. 28905 (Sub-No. 22)

CSX CORPORATION—CONTROL—CHESSIE SYSTEM, INC., AND SEABOARD COAST LINE INDUSTRIES, INC.

---

Finance Docket No. 21215 (Sub-No. 4)

SEABOARD AIR LINE R.R. CO.—MERGER—
ATLANTIC COAST LINE R.R. CO.

---

*COMMISSIONER LAMBOLEY*, dissenting:

This is one in a series of three recent cases involving Commission review of arbitration awards.[1] In each case I find myself at odds with the majority's disposition.[2] I am concerned that we may becoming result-oriented in our review of awards, notwithstanding Commission standards applicable to the limited scope of deferential review.[3]

The present case involves an arbitration proceeding allegedly undertaken pursuant to the jurisdictional au-

---

[1] See FD No. 29430 (Sub-No. 20), *Norfolk Southern Corp.—Control—Norfolk & Western Ry. Co. and Southern Ry. Co.*, (not printed), served June 10, 1988, (*NS-Arb*); FD No. 28583 (Sub-No. 24), *Burlington Northern, Inc.—Control & Merger—St. Louis—San Francisco Ry. Co.*, (not printed), served June 23, 1988. (*BN-Arb*)

[2] In *NS-Arb* the majority affirmed an award terminating employee RLA representation rights to effect a transfer; and in *BN-Arb*, the majority reversed and dismissed a proceeding concluding there was no jurisdiction for the award under previously imposed merger conditions.

[3] See *Chicago & Northern* [*sic*] *Western Trans. Co.—Abandonment* 3 I.C.C. [2d] 729 (1987) (aka *Lace Curtain*); FD No. 28490 (Sub-No. 1), *Atlantic Richfield Co. and Anaconda Co.—Control—Butte Anaconda & Pac. R.R. Co.*, (not printed), served March 2, 1988 (*ARCO/BAP*).

thority of the protective conditions imposed in the 1980 *CSX Corp.—Control—Chessie and Seaboard Co. L. I.* case.[4]

A close reading of the underlying *CSX-Control* case leaves substantial doubt whether there is any proximate nexus between the control transaction approved by the Commission and the transaction here at issue occurring some seven years later.[5]

In my view, causation presents a substantial jurisdictional issue in this case.[6] I believe our remand does not include appropriate instructions to guide the panel on rehearing.

From the outset, the basic question whether the arbitration panel has requisite subject matter jurisdiction has been vigorously disputed by BRC. However, the panel in its award finds and concludes it has requisite jurisdiction based upon the parties *concurrence*.[7] Quite apart from considering whether jurisdiction can be obtained by stipulation, the panel's determination on that point is simply contrary to record fact.

The essence of the BRC argument, both before the arbitration panel and the Commission, is that while transfer of work may be a transaction that customarily falls within the scope of *NY Dock* conditions, subject matter jurisdiction depends on whether a particular

---

[4] 363 ICC 521 (1980) (*CSX Control*).

[5] Issues of proximate nexus and causation are discussed in *Southern Ry. Co.—Control—Central Georgia Ry Co.*, 317 I.C.C. 729 (1963) aff'd *sub. nom. RLEA v. U.S.* 266 F. Supp. 521 (ED. VA. 1964) vac'd other grounds 379 U.S. 199 (1984) [*sic*], *Leavens v. Burlington Northern, Inc.* 348 I.C.C. 962 (1977). See also recent arbitration review cases *ARCO/BAP, supra BN-Arb, supra* and *NS-Arb, supra*, (also my dissent in *NS-Arb*).

[6] Cf. *BN-Arb, supra*. Our jurisdictional authority for review here is not at issue.

[7] *Award*, p. 29.

transfer has a proximate or causal relationship to the underlying *control* transaction to which the conditions apply.[8] Thus, despite the fact that BRC generally "concurs" that a transfer transaction may be within *NY Dock* conditions, it contends this specific transaction is not because there is no proximate linkage to the transaction originally approved in the *control* case on which the conditions were imposed. Therefore, if the transfer is outside the scope of the approved transaction in *CSX-Control*, there is no requisite subject matter jurisdiction for these arbitration proceedings.[9]

A critical reading of the underlying *control* case casts serious doubt on a favorable finding of causation necessary to include this transfer transaction within the scope of the original transaction and its conditions. Nowhere in *CSX Control* was there any hint or suggestion that the Waycross-Raceland transfer was, immediately necessary, or in the future, could reasonably be anticipated as a subsequent event directly resulting from control. Indeed, the contrary would be a more ready conclusion.

In reviewing public benefits anticipated from various aspects of the control transaction, no mention is made of consolidation of heavy equipment repair at any location(s) within or between the systems to be controlled. The control transaction expressly contemplates control not merger, and continued operation of the individual railroads as separate corporate entities within each of the Chessie and SCLI rail systems. "Control" in the original transaction was little more than authority to coordinate the operation of two systems for purposes of

---

[8] See *BRC* Pre-Hearing Submission, Post-Hearing Submission, and Opinion of dissenting panel member to Award; Answer and Cross complaint for review.

[9] See *Southern Ry. Co., supra*; *BN-Arb supra*, also 49 U.S.C. §§ 11341(a), 11343.

achieving expanded "single system", but not "single line service." [10]

Anticipated impact on employees, in the control transaction was not regarded as significant. Dislocations were to be "short-lived" and expected to "occur within six months following final approval." Further, "perceptible" dislocations were possible "only at points where the basically end-to-end systems meet" to mesh for coordination of operations and which points were "clearly identified".[11]

Interestingly, the Raceland facility is specifically mentioned, but only with reference limited to the creation of additional, new jobs resulting from increased production of railcars at that facility, not transfer of repair work.[12]

As a matter of procedure, the failure to include transfer of work to the Tampa facility in the company's NOTICE while possible error, in the circumstances of this case cannot be considered prejudicial. BRC had fair opportunity to address the issue. However, the panel's failure to include Tampa and consider the Waycross-Raceland-Tampa relationship may have arguably impacted a residual number of employees at Waycross without apparent work to perform, at a time when the company reasonably anticipated transferring to Tampa, work previously planned for Waycross in 1987.[13]

Finally, the majority attempts to establish the proposition that *any* conflict, regardless of origin or degree, is an impediment pre-empted by ICA provisions.[14] In my view, this represents a continuing effort to modify Com-

---

[10] *CSX Control supra*, pp 533, 535, 553-556, 575-576.

[11] Id., at pp. 588-589.

[12] Id., at pp. 588-589, 641.

[13] See *Award*, Carrier Members Reply to Dissent.

[14] 49 U.S.C. § 11341(a).

mission precedent and runs contrary to existing judicial precedent.

Such precedent finds that Section 11341(a) is not absolute in its terms or in its operation; nor is it necessary that it be so in order to effect approved transactions. In a voluntary merger proceeding, the Supreme Court has held that once conditions requisite for approval have been satisfied, the Commission-approved transaction is self-executing, and further found that:

> "the parties are relieved of 'restraints limitations and prohibitions of law, Federal, State, or municipal' *insofar as may be necessary to enable them to carry into effect the transaction so approved.*" (emphasis added)[15]

The Court has also found that a "to the extent necessary" determination for exemption purposes does not require the Commission to contemplate unforeseeable legal obstacles or enumerate every legal obstacle that is waived.[16]

Courts of Appeal reviewing Commission decisions have likewise required a "to the extent necessary" showing for pre-emption purposes.[17]

---

[15] *Schwabacher v. U.S.* 334 U.S. 182 (1948) (construing Section 5(11), predecessor to Section 11341).

[16] See *County of Marin v. United States*, 356 U.S. 412 (1958).

[17] See *Texas & New Orleans R. Co. v. Bhd. of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962) *cert. den.* 952 [*sic*] U.S. 934 (1963), *City of Palestine, Texas v. U.S.*, 559 F.2d 408 (5th Cir. 1977) *cert. den.* 435 U.S. 950 (1978). Also, FD No. 30000 (Sub-No. 18), *Denver & Rio Grande Western R.R. Co.—Trackage Rights Between Pueblo CO. and Kansas City, MO. (DRGW)* (not printed) (served October 19, 1983, *rev'd, sub nom., BLE v. I.C.C.*, 761 F.2d 714 (D.C. Cir. 1985) rev'd on other grounds —— U.S.—— (June 8, 1987) Cf. *BLE v. CNW*, 314 F.2d 424 (8th Cir. 1962), *cert. den.* 375 U.S. 819 (1963).

For its part, the Commission has historically taken the position that it will limit its review of issues involving application and interpretation of merger conditions. Moreover, in discussing this role, the Commission has clearly emphasized the beneficial purpose of protective conditions and the positive contribution found in accommodating the policies of the ICA and the RLA.

In *Leavens v. Burlington Northern,*[18] concluding its scope of review should be limited, the Commission held:

> "Our review should be limited to those matters that either result from the merger or which claim violation of a specific merger-related harm." Obviously, we would review such allegations only to determine whether or not the carrier has failed to implement the protections we recognized for adversely affected employees." [19]

Commenting on the special relationship between protective conditions, collective bargaining, and arbitration, the Commission observed:

> "However, in dealing with these protective conditions, the Commission is faced with a special problem—defining the extent of our ongoing responsibility to consider alleged breaches of the protective conditions for which an arbitration remedy is pro-

---

[18] *Leavens, et al. v. Burlington Northern, Inc.* 348 I.C.C. 962 (1977).

[19] Id. at p. 975. This limited role was recently reaffirmed in FD No. 40074, *UTU v. Burlington Northern R. Co. and Houston Belt & Terminal Ry Co.* (not printed), served March 30, 1987). (The Commission stating: "It is clear that we have jurisdiction over those labor matters which stem from the conditions we adopted at the time the merger was authorized.") See also, FD No. 21478 (Sub-No. 7), *Great Northern Pac. & Burlington Lines, Inc.—Merger —Great Northern Ry, (Arco)* (not printed, served March 16, 1987). But see: FD No. 21478 (Sub-No. 6), *Great Northern Pac. & Burlington Lines, Inc.—Merger—Great Northern Ry, (Landis)* (not printed), served December 11, 1986.

vided. In adopting these protective conditions and the related arbitration provisions, we provided that those who were most familiar with the complexities of labor law and the peculiar problems associated with railroad employees would determine disputes arising out of such conditions. This Commission did not intend to place itself in the fields of collective bargaining or labor management relations nor do the provisions of the Interstate Commerce Act require it. We should be careful so that we do not, because of lack of expert competence, contravene the national policy as to labor relations." [20]

Emphasizing the need to accommodate the respective policies of the ICA and RLA, the Commission stated:

"Our responsibility to impose protective conditions in a merger was not meant to give the Commission a right to interfere in the normal give and take of collective bargaining.

" 'The policies of the Interstate Commerce Act and the labor act necessarily must be accommodated one to the other.' (citation omitted).

"We feel that in making the accommodation this Commission should undertake to enforce these protective conditions only to the extent stated above, i.e., to the extent that affected employees have suffered harm in violation of the adopted conditions as a result of the transaction or to the extent that a specific condition intended to protect against a specific harm that would result from the merger." [21]

More recently, the Commission has stated:

"As UTU notes standard labor protective conditions generally preserve working conditions and collective

---

[20] Ibid.

[21] *Id* at p. 976.

> bargaining agreements. The terms of those conditions, however, must be read in conjunction with our revision authorizing the involved transaction and the underlying statutory scheme. *To the extent* that existing working conditions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give to the implementation of the transaction." (emphasis added.)[22]

In my view, the majority decision here seeks to enhance the dicta of *Maine Central*[23], further narrow the qualifying language of *DRGW* and ignore judicial precedent in pursuit of what I fear may be a goal to preempt application of all other laws, and at the same time, consistently deny the consideration of protections and remedies those laws provide. I continue to subscribe to the view that definition and accommodation of conflict, where possible, are more appropriate in dispute resolution proceedings.[24] To that end, I am inclined to accord substantial deference to labor arbitration proceedings.

---

[22] *DRGW, supra*; also *NS-Arb, supra.* Earlier, the Commission had observed that it may nullify only those restraints that are "materially related" to a proposed merger or consolidation. See *Missouri Pac. R. Co.—Merger,* 354 I.C.C. 763 (1978) (commenting on *City of Palestine* decision.

[23] FD No. 30532, *Maine Central R. Co., et al.—Exemption from 49 U.S.C. §§ 11342 and 11343* (not printed), served September 13, 1985 *aff'd mem., sub. nom. RLEA v. I.C.C.,* 812 F.2d 1443 (D.C. Cir. 1987).

[24] See my separate expressions *NS-Arb supra, BN-Arb supra* and FD No. 30853, *Rowlett v. Missouri Pacific R. Co.,* (not printed), served August 19, 1987.

## APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

---

No. 87-8466

---

D.C. Docket No. 286-243

BROTHERHOOD RAILWAY CARMEN,
Division of Transportation
Communications International Union (TCU),
*Plaintiff-Appellant,*

versus

CSX TRANSPORTATION, INC.,
*Defendant-Appellee.*

---

Appeal from the United States District Court
for the Southern District of Georgia

---

Before HILL and EDMONDSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the said District Court in this cause be and the same is hereby VACATED; and that this cause be and the same is hereby, REMANDED to said District Court with instructions to dismiss for lack of subject matter jurisdiction.

It is further ordered that plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: September 19, 1988

For the Court: Miguel J. Cortez
Clerk

By: /s/ Karleen McNabb
Deputy Clerk

Issued as Mandate: Oct. 17, 1988

## APPENDIX E

## STATUTES RELIED UPON

**I. Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.* (Excerpts)**

A. Section 11341(a), 49 U.S.C. § 11341(a)
B. Section 11343(a), 49 U.S.C. § 11343(a)
C. Section 11344(a), 49 U.S.C. § 11344(a)
D. Section 11347, 49 U.S.C. § 11347

**II. Railway Labor Act, 45 U.S.C. § 151, *et seq.* (Excerpts)**

A. Section 2 First, 45 U.S.C. § 152 First
B. Section 2 Seventh, 45 U.S.C. § 152 Seventh
C. Section 5 First, 45 U.S.C. § 155 First
D. Section 6, 45 U.S.C. § 156
E. Section 7 First, 45 U.S.C. § 157 First

**III. Rail Passenger Service Act of 1970, 45 U.S.C. § 501, *et seq.* (Excerpt)**

A. Section 405(b), 45 U.S.C. § 565(b)

**IV. 28 U.S.C. § 1337**

---

**I. Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.* (Excerpts)**

**A. Section 11341(a), 49 U.S.C. § 11341(a)**

(a) The authority of the Interstate Commerce Commission under this subchapter is exclusive. A carrier or corporation participating in or resulting from a transaction approved by or exempted by the Commission under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law,

including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction. However, if a purchase and sale, a lease, or a corporate consolidation or merger is involved in the transaction, the carrier or corporation may carry out the transaction only with the assent of a majority, or the number required under applicable State law, of the votes of the holders of the capital stock of that corporation entitled to vote. The vote must occur at a regular meeting, or special meeting called for that purpose, of those stockholders and the notice of the meeting must indicate its purpose.

**B. Section § 11343(a), 49 U.S.C. § 11343(a)**

(a) The following transactions involving carriers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I (except a pipeline carrier), II, or III of chapter 105 of this title may be carried out only with the approval and authorization of the Commission:

(1) consolidation or merger of the property or franchises of at least 2 carriers into one corporation for the ownership, management, and operation of the previously separately owned properties.

(2) a purchase, lease, or contract to operate property of another carrier by any number of carriers.

(3) acquisition of control of a carrier by any number of carriers.

(4) acquisition of control of at least 2 carriers by a person that is not a carrier.

(5) acquisition of control of a carrier by a person that is not a carrier but that controls any number of carriers.

(6) acquisition by a rail carrier of trackage rights over, or joint ownership in or joint use of, a railroad line (and terminals incidental to it) owned or operated by another rail carrier.

**C. Section 11344(a), 49 U.S.C. § 11344(a)**

(a) The Interstate Commerce Commission may begin a proceeding to approve and authorize a transaction referred to in section 11343 of this title on application of the person seeking that authority. When an application is filed with the Commission, the Commission shall notify the chief executive officer of each State in which property of the carriers involved in the proposed transaction is located and shall notify those carriers. If a motor carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title is involved in the transaction, the Commission must notify the persons specified in section 10328(b) of this title. The Commission shall hold a public hearing when a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter is involved in the transaction unless the Commission determines that a public hearing is not necessary in the public interest.

**D. Section 11347, 49 U.S.C. § 11347**

When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45. Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its em-

ployees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period).

---

**II. Railway Labor Act, 45 U.S.C. § 151, *et seq.* (Excerpts)**

**A. Section 2 First, 45 U.S.C. § 152 First**

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

**B. Section 2 Seventh, 45 U.S.C. § 152 Seventh**

No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

**C. Section 5 First, 45 U.S.C. § 155 First**

The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

**D. Section 6, 45 U.S.C. § 156**

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after

the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences, without request for or proffer of the services of the Mediation Board.

**E. Section 7 First, 45 U.S.C. § 157 First**

Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in the preceding sections, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: Provided, however, That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise.

---

**III. Rail Passenger Service Act, 45 U.S.C. § 501, *et seq.* (Excerpt)**

**A. Section 405(b), 45 U.S.C. § 565(b)**

Such protection arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and

benefits (including continuation of pension rights and benefits) to such employees under existing collective-bargaining agreements or otherwise; (2) the continuation of collective-bargaining rights; (3) the protection of such individual employees against a worsening of their positions with respect to their employment; (4) assurances of priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of the Interstate Commerce Act. Any contract entered into pursuant to the provisions of this title shall specify the terms and conditions of such protective arrangements. No contract under section 401(a)(1) of this Act between a railroad and the Corporation may be made unless the Secretary of Labor has certified to the Corporation that the labor protective provisions of such contract afford affected employees, including affected terminal employees, fair and equitable protection by the railroad.

---

IV. 28 U.S.C. § 1337

(a) The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies: Provided, however, That the district courts shall have original jurisdiction of an action brought under section 11707 of title 49, only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and costs.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where a plaintiff who files the case under section 11707 of title 49, originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of any interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) The district courts shall not have jurisdiction under this section of any mater within the exclusive jurisdiction of the Court of International Trade under chapter 95 of this title.

## APPENDIX F

IN THE MATTER OF ARBITRATION BETWEEN

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

AND

UNION PACIFIC RAILROAD COMPANY
MISSOURI PACIFIC RAILROAD COMPANY

---

### DECISION

File:

Finance Docket No. 30,000

Arbitrator:

Jacob Seidenberg, Esquire

Hearing:

December 13, 1984

Appearances:

Brotherhood of Locomtive Engineers
W.H. Hirst—Vice President
E.E. Watson—Vice President

Carriers

R.D. Meredith—Director Labor Relations—
Union Pacific
R.P. Mitchell—Director Labor Relations—
Missouri Pacific

Post Hearing Briefs Received:

December 29, 1984

Issues:

1). Does Arbitrator have jurisdiction under Section 4, Article I of the ICC imposed New York Dock Conditions to permit Carriers to transfer work from Missouri Pacific RR to Union Pacific and have transferred work performed under the operating rules and collective bargaining agreement between the Union Pacific RR and the BLE?

2). Does the proposed transfer of work constitute a fair and equitable basis for the selection and assignment of forces under a New York Dock transaction?

Background:

The instant dispute has been precipitated as a result of the Interstate Commerce Commission approving on October 20, 1982 the petitions of the Union Pacific RR, the Missouri Pacific RR and the Western Pacific RR to consolidate and create a new railway system.

In the course of effectuating this new railroad network, the affected Carriers sought to achieve certain "common point consolidations". The parties to this dispute reached agreement on seven common points, but were unable, after six conferences, to reach agreement at the following three common points: Salina, Kansas, McPherson, Kansas; and Beloit, Kansas.

On October 30, 1984, the disputants agreed to submit the matter to arbitration, as provided for by Article I Section 4 of the New York Dock Conditions. These Conditions had been imposed by the Interstate Commerce Commission upon the Carriers as protections for the employees of the three Carriers affected by the consolidation.

The parties selected the Undersigned to hear and decide the dispute.

On October 19, 1983, the ICC issued a Decision under Finance Docket No. 30,000 (Sub-No. 18) in response to petitions filed both by the BLE and UTU relative to the Commission's plenary jurisdiction over rail consolidation *vis a vis* the requirements of the Railway Labor Act.

The substantive aspects of the dispute stem from the notices served by the Carriers on the Organization pertaining to the selection and assignment of forces at the three common points, and counter proposals thereto. However, before we can deal with the merits, we must review a procedural objection which the Organization has interposed to the Arbitrator's jurisdiction to consider the dispute.

Organization's Position (Procedural)

The Organization notes that Article I, Section 2 of the ICC prescribed New York Dock Conditions states:

> "2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes."

The Organization maintains that the Carriers seek to avoid their statutory obligation under the Railway Labor Act, not to unilaterally change rates of pay or terms of working conditions, except in accordance with the provisions of Section 6 of the RLA. The Organization specifically protests the Carriers' efforts to get rid of the Local Agreement of August 10, 1946 in effect on the Missouri Pacific as well as other working conditions. The Organization stresses that at each of the three common points the Carriers do not propose to abandon tracks or facilities. It just seeks to substitute Union Pacific

employees and Union Pacific rules for Missouri Pacific employees and Missouri Pacific rules without complying with the RLA requirements.

The Organization asserts the explicit language of Section 2 of Article I, proscribed the Carriers from utilizing Section 4 of Article I as a means to change existing agreements, except by mutual consent. It further asserts that it would be ironic to transmute the New York Dock Conditions from a shield designed to protect employee interests to a sword to deprive employees of their Railway Labor Act protections.

The Organization alludes to several (6) arbitration awards which have found that arbitrators acting under the mandate of Section 4 lack the authority to modify or vitiate existing collective bargaining agreements, in light of the explicit provisions of Section 2. The Organization notes that the Carriers, despite all of the cited awards, did not even request the ICC to overrule these arbitration awards. The Carriers should not be permitted in the instant case to overrule these well reasoned awards.

The Organization notes that the October 19, 1983 ICC clarification has been appealed to the Federal Courts and the appeal is still pending.

Carrier's Position (Procedural)

The Carrier states that since the ICC issued its October 19, 1983 Clarification, the jurisdictional question raised by the Organization is moot and settled. The ICC has held its authority over railroad consolidations is exclusive and plenary, and its approval of a transaction exempts such a transaction from the requirements of all laws including the Railway Labor Act. The Carriers note that the ICC Clarification states:

> "If our approval of a transaction did not include authority for the railroads to make necessary

changes in working conditions, subject to payments of specified benefits, our jurisdiction to approve transactions requiring changes in the working conditions of any employees would be substantially nullified. Such a result would be clearly contrary to congressional intent."

The Carrier maintains that the arbitration awards rendered prior to October 19, 1983, must be deemed to have been superceded by the ICC's Clarification Decision. Since the ICC authored the New York Dock Conditions, its holdings as to the intent and purpose of these Conditions must be deemed superior to any arbitral decisions interpreting the Conditions. The Carriers add the ICC Clarification makes it patently clear that no existing working conditions in a collective bargaining agreement barred the execution of the ICC approved Consolidation.

The Carrier further stresses that since the ICC rendered its Clarification Decision there have been two arbitration awards which held there was jurisdiction in an Article I, Section 4 arbitration proceeding to consider changes in existing collective bargaining agreements.

The Carrier states on the basis of the present record there can be no doubt that this Arbitrator, acting under Section 5, has the jurisdiction and authority to approve the transfer of work from the Missouri Pacific to the Union Pacific and place the transferred work under the operating rules and collective bargaining agreements of the Union Pacific.

Findings: (Procedural)

On the basis of the record before us we conclude that we now have jurisdiction to consider the dispute involving the allocation and assignment of forces through implementing agreements drafted pursuant to New York Dock Conditions, even though these implementing agreements may result in the assigned forces operating under

a different set of operating rules and different labor agreement than the ones under which they formerly functioned.

We find that, despite the weight of arbitral authority that was formerly in effect prior to the ICC October 19, 1983 Clarification Decision, those arbitration awards must now yield to the findings of the Clarification Decision, i.e., that in effecting railroad consolidations the Commission's jurisdiction is plenary and that an arbitrator functioning under Article I, Section 4, of the labor protective conditions, is not limited or restricted by the provisions of any laws, including the Railway Labor Act, and that the arbitration provisions of the New York Dock Conditions are the exclusive procedures for resolving disputes arising under the Consolidation. We find that the interpretation and application of the Commission as to the scope of its prescribed labor conditions in the instant case, has to be given greater weight than an arbitration award also pertaining to the scope of these labor protective conditions.

When we turn to the substantive aspects of the dispute dealing with the three common points, there are three separate and discrete matters which will be treated in considering the proposed implementing agreements.

*Salina, Kansas*

This point is currently served by both the UP and MP. Both Carriers serve it by freight assignments. The UP also serves it by switch engine assignments, and the MP by a traveling switch engine.

The Carriers now propose to service Salina by a single UP traveling road switcher which will operate within a 50 miles area of Salina under the UP's operating and schedule rules. The MP traveling switcher will be abolished.

The Organization proposes that the Road Switcher shall be operated by MP employees and it will not perform any switching within the switching limits of Salina.

The Carrier also sets forth how road operations will be handled into and out of Salina and off the MP's Salina Division. These proposals are to have UP crews handle traffic routed via UP while MP crews will handle traffic routed via the MP. Employees adversely affected will receive the protection of the New York Dock Conditions.

The Organization stresses that MP engineers will only be able to exercise their seniority on their own seniority district. If they transfer to another seniority district, they would be listed after the most junior employee in that district. The Organization stresses that since the New York Dock Conditions now offer maximum protection for only six years, this does not effectively afford any meaningful protection to younger employees. It urges the work should be prorated on the basis of engine hours or road miles.

Findings:

After reviewing the detailed proposal contained in the draft implementing agreements of the parties attached to their respective Submissions, we conclude that the Carriers Implementing Agreement (attachment No. 1) with its addenda, more effectively achieves the consolidation and coordination of the operations at Salina. We are not at liberty to overlook that the ICC approved the consolidation under the common control of the Union Pacific Railway System. Accordingly, we find that Carriers' Attachment No. 1, dated September 18, 1984, constitutes the appropriate arrangement for the Salina operations and it is to be the implementing agreement for the Salina operation.

*McPherson-El Dorado*

McPherson is serviced by both the UP and MP. The UP serves McPherson by a local freight assignment operating out of Salina while the MP services it by a local freight assignment operating out of El Dorado. Salina is 35.4 miles from McPherson while El Dorado is 61.7 miles from McPherson.

The Carriers propose to serve McPherson by combining both local freight assignments into a single local to be governed by UP schedule and operating rules. The UP would man the operation for five months and the MP for seven months. The Organization's counter proposal is to apportion the work—36% to UP and 64% to the MP. The Carriers propose Salina to be the home terminal, and the Organization counter proposes that Salina be the home terminal, when the UP engineers are manning the assignment and El Dorado will be the home terminal when MP engineers are protecting the work. The Organization further proposes that when MP engineers operate their alloted proration they will operate under MP rules and MP schedule provisions covering rates of pay and working conditions.

Findings:

We find that the objectives of the coordination and consolidation would be facilitated by the Carriers' proposals as set forth in their Attachment No. 2 attached to Carriers' Submission, with one exception, namely, that when the MP engineers operate the local freight assignment their home terminal should be El Dorado rather than Salina. The great bulk of MP engineers live in the vicinity of El Dorado and there is no persuasive reason why these engineers should travel approximately 90 miles to work that assignment. However, we find that in the interest of uniformity and consistency of operations that the assignment should operate under UP rules rather

than shift back and forth periodically between MP and UP.

Accordingly, we find that Carriers' Attachment No. 2 with its Attachments set forth in its Submission, except as herein amended, shall constitute the implementing agreement to handle the UP and MP traffic between Salina and El Dorado.

*Beloit*

Beloit is serviced both by UP and MP. The UP services it with local freight assignments operating out of Salina while the MP services it with a local assignment operating out of Concordia. In addition the MP operates several local freight assignments operating west of Frankfort such as:

Atchison-Concordia Local
Concordia-Stockton Local
Down-Lenora Local

The Carriers propose to abolish these listed MP operated Local Assignments and serve Beloit with a consolidated operation to be operated by MP crews because most of the employees living near Beloit are MP employees. The consolidated assignment shall operate, however, under UP rules and schedule provisions.

The Organization contends there is no valid basis to compel MP employees to operate UP rules. The MP employees should be allowed their own rules, rates of pay and working conditions when they function under their allocated proration.

Findings:

We find the allocation of work of Beloit as proposed by the Carriers is fair and reasonable and therefore the description of work set forth in Attachment No. 3, attached to Carriers' Submission, should be governed by the Carriers' proposed implementing agreement.

Accordingly, Carriers' Attachment No. 3 with its attachments shall constitute the implementing agreement to handle operations at Beloit, including the designated territory listed in aforesaid Attachment.

In summary we are aware that any consolidation of rail properties disturbs the status quo and is unsettling to the affected Organization and employees. However, the Interstate Commerce Commission held that the Consolidation here in issue, with the prescribed labor conditions, is consistent with the public interest (366 ICC 619), and it must be accepted disturbing as it may be, even to the extent of doing away with the MP August 10, 1946 Local Agreement. We find that the Carriers have sought to select and assign the forces, in a fair and reasonable manner, and still achieve the efficiency and benefits which were the prime motivations for seeking the Consolidation. We find that conducting all three common point operations under the UP operating rules and schedule rules are not inconsistent with these objectives, since the UP has common control of the consolidation.

We conclude that the approved proposals, as amended, covering the three common points are an appropriate method for the selection and assignment of forces, and should be effected by the prescribed implementing agreements.

Decision:

Pursuant to Article I, Section 4 of the New York Dock Conditions, we find that the implementing agreement set forth in Carriers' Attachment No. 1 shall be the method for selecting and assigning the forces for the Salina operation.

We find further that implementing agreement, as amended, set forth in Carriers' Attachment No. 2, shall be the method for selecting and assigning the forces for the McPherson-El Dorado operation.

We also find that the implementing agreement set forth in Carriers' Attachment No. 3 shall be the method for selecting and assigning the forces in the Beloit operations.

/s/ Jacob Seidenberg
JACOB SEIDENBERG
Arbitrator

January 17, 1985.

## APPENDIX G

October 10, 1986

Mr. J. T. Williams
Director of Labor Relations
CSX Transportation Co.
Equipment Group
Baltimore, Maryland

RE: Your notice of August 29, 1986 concerning transfer of Heavy Repair Freight Car work from Waycross, Georgia on the SCL Railroad to Raceland, Ky. on the C&O Railroad. Carrier File No. G-125 Waycross-Raceland DD5 86/08/020.

Dear Mr. Williams:

In regards to the above referenced matter on which we held the initial conference on September 10, 1986, and further conference on October 10, 1986, this is to advise that as a result of our failure to reach agreement on certain issues concerning this matter within 30 days from the date of our initial meeting, that the Organization is hereby serving notice on you, the Carrier, of our intent to submit the matter to arbitration pursuant to Section 4 of the Agreement for Protection of Employees in Event of Merger, dated November 3, 1986, and more commonly referred to as the Orange Book Agreement, as well as Article I, Section 4 of the New York Dock Protective Agreement. This notice being served under both Agreements since the protection of involved claimants, and the unresolved questions, fall partially under one Protective Agreement and partially under the other Protective Agreement.

The Organization designates Mr. R.P. Wojtowicz as the Organizations member of the Arbitration Committee, and, he is available to you immediately for the purpose

of reaching an agreement as to the neutral member of this Arbitration Committee.

The questions at issue in this dispute are contained in my Certified Mail letter to you dated September 2, 1986, and said questions at issue are as follows:

1. Is Carrier's notice dated August 28, 1986, concerning transfer of Heavy Repair Freight Car work from Waycross, Ga. on the SCL R.R. to Raceland, Ky. on the C&O R.R. adequate and specific enough notice (inasmuch as it does not describe the SCL Heavy Repair Work being moved to Raceland, Ky., nor does it describe the position of approximately 22 of our members whose jobs are being abolished) under the Agreement for protection of Employees in Event of Merger, dated November 3, 1966 and commonly referred to as the Orange Book Agreement, as well as the New York Dock Protective Agreement?

2. Can the effected employees who have lifetime guaranteed jobs on the SCL R.R. under the Orange Book Protective Agreement—which Agreement gives the Carrier the right to transfer work and employees from their home point to other points on the SCL R.R.—now be transferred by the Carrier to another point on another Railroad which is not on the property of the former SCL R.R., when the intent and purpose of this Agreement was only to transfer employees from one point to the other on the former SCL property?

3. Can the Carrier move the work contracted in their Working Agreement to the SCL employees out from under this Agreement and place said work under another contract (Working Agreement) when both Assignments are still separate and in effect on the separate properties?

Please promptly advise the name of the Carrier member; and, if the Carrier's member and our member, Mr. R.P. Wojtowicz are unable to agree upon the selection of

a referee within 10 days from the date of this letter, in accordance with Section 4 of the Protective Agreements, we will request that the National Mediation Board appoint a referee in this case.

Very truly yours,

/s/ L. W. McAlpine, Jr.
L. W. McALPINE, JR.,
General Chairman

LWM:bjd

cc: C.E. Wheeler
R.P. Wojtowicz
L.A. Sutton
B.J. Crews

Mr. L. W. McAlpine, Jr., General Chairman
Brotherhood Railway Carmen of the U.S. and Canada
P.O. Box 3744
Savannah, GA. 31404-0244

Mr. Robin Utter, General Chairman
Brotherhood Railway Carmen of the U.S. and Canada
857 McKinley Street
Toledo, Ohio 43605

October 15, 1986

Gentlemen:

This refers to notice dated August 29, 1986, of Carriers' intent to transfer freight car heavy repair work from Waycross, Georgia to Raceland, Kentucky, and Mr. McAlpine's October 10, 1986 letter concerning that notice.

In view of the refusal of the Organization to negotiate an implementing agreement as required by the New York Dock conditions, Carriers' proposal presented to you during conference on October 10, 1986, is hereby withdrawn.

This is notice of Carriers' intent to refer the dispute to an arbitration committee for resolution pursuant to Section 4(a) of Article I of the New York Dock conditions. The question posed by the Carriers shall be:

> "Shall the terms of the attached agreement, proposed by the Carriers, apply to the implementation of the Carriers' August 29, 1986 notice to transfer all freight car heavy repair work from Waycross, Georgia to Raceland, Kentucky and to coordinate such work with that presently being performed at Raceland under the C&O Agreement?"

A copy of the Carriers' proposed implementing agreement to be submitted to the arbitration committee is attached.

The undersigned is designated as the Carrier Member of the arbitration Committee. You are requested to join in the selection of a neutral referee within five days.

Very truly yours,

/s/ J. T. Williams
J. T. WILLIAMS
Director Labor Relations

cc: Mr. R. P. Wojtowicz
Mr. R. Blevins

November 4, 1986

Mr. J. T. Williams
Director of Labor Relations
CSX—Transportation
Equipment Group
100 N. Charles St.
Baltimore, Maryland 21201

RE: Your notice dated August 29, 1986 concerning transfer of freight car heavy repair work from Waycross, Ga. on the SCL R.R. to Raceland, Ky. Carrier File No. G-125 Waycross-Raceland.

Dear Mr. Williams:

In regards to the above referenced matter please be advised that after obtaining a copy of, and thoroughly studying, the decision of I.C.C.'s Financial Docket No. 28905 (Sub-No. 1) CSX CORPORATION—CONTROL—CHESSIE SYSTEM, INC. AND SEABOARD COAST LINE INDUSTRIES, INC., under which your above referenced notice was served, I have found that in this financial docket:

1. "CSX was incorporated for the purpose of this transaction and its present activities are related solely to this transaction.

   "Pursuant to the terms of the proposed merger agreement, Chessie and SCLI will merge into CSX. CSX will thus acquire control of those rail carriers currently controlled by Chessie and SCLI. *The individual railroads under CSX will continue to operate as separate corporate entities within a single railroad system.*" (underscoring ours)

2. The holding Companies were permitted to merge but that the decision of the Commission was that:

"The subsidiary rail carriers will remain as separate corporate entities."

". . . . (traffic must still be interchanged among the affiliated carriers, . . ."

"Chessie is a non-carrier holding company. . . ."

"Under the proposal, only the holding companies (Chessie and SCLI) will merge, creating a new holding company, CSX. The rail subsidiaries will continue to operate as separate entities under the new umbrella. . . ."

"SCLI is also a non-carrier holding company."

3. "Applicants propose a number of projects designed to *coordinate operations at points where the two systems meet.*" (underscoring ours)

"To coordinate the operations of the two systems, applicants have proposed various operational changes. Some of these proposed changes require separate applications."

"Applicants claim that coordinations between the mechanical departments will allow them to achieve cost savings through the expanded use of C&O's Raceland car building facility at Russell, KY, and the expansion of coal car capacity. Applicants plan to use excess capacity at C&O's Raceland facility to *manufacture cars* for Family Lines. C&O will sell these cars to Family Lines at $8,657 below market price. Applicants claim that total savings to the system will be approximately $20.2 million annually." (underscoring ours)

In Appendix E of the Commission's decison, under Paragraph C headed "*Mechanical*" they stated:

"Chessie plans to utilize excess *manufacturing* capacity at its Raceland car shop in Russell, Ky. to construct over a three year period 7,000 coal *hopper cars* for use by Family Lines." (underscoring ours)

"Each railroad will continue to report separately to the Commission, . . ."

4. "We are not prepared, however, to find that the system approach is any less advisable in these circumstances than a wholesale merger of the carriers. A merger could very well present problems not associated with a controlling situation. For example, re-negotiations of labor agreements may be difficult. . . . Were they to discover that a wholesale merger in fact would lead to greater efficiency gains and profits then under the system approach, we think it likely that they would change their plans."

5. "Applicants estimate that the consolidation will actually increase the number of jobs on Chessie and Family Lines railroads, by a net of 276 positions.[62] The bulk of those created, 346 positions will result from the increased production of rail cars at Chessie's Raceland facility in Russell, KY. A number of positions will be abolished under the operating coordinations pursuant to applicants' related applications. *These dislocations, however, are said to be short-lived. It is anticipated that all changes in employee positions will occur within 6 months following final approval of the applications.*" (emphasis ours)

---

"[62] The transaction involves the transfer of 15 positions, the creation of 446 new positions, the consolidation of 484 positions, and the abolishment of 170 positions. By the end of the third year following consummation, based on 1977 data, total savings from positions abolished are estimated to be $3,935,860, and costs for new positions created are estimated to be $10,531,576."

6. In the findings of the Commission it is stated:

> "(55) No change or modification shall be made in the terms and conditions approved in the authorized applications without the prior approval of the Commission."

From the above quotes and other sections of the I.C.C. decision of Finance Docket 28905 (Sub.-No. 1) it is clearly evident that the approved merger was of the Chessie Systems Inc. and SCL Industries, Inc. which are the holding companies; and that the individual railroads under these holding companies were *not* merged and are still *separate corporate entities.*

In our quote listed as Item No. 1 in this letter it is evident that the only rights given under this merger were those applied for by the holding companies and granted by the I.C.C., and, that the individual carriers cannot now, or at any other time under this Finance Docket expand upon or add to the applied benefits of said document.

Under our Item No. 3 of this letter and other sections of this decision by the I.C.C. they have made it clear that the only coordinations would be where the individual railroad companies meet and have facilities all within one geographical area. Along these lines we wish to point out that Waycross, Ga. on the CSX Transportation Co. R.R. is some 500 miles or more from the nearest property of the C&O R.R. Co. Therefore, nothing in this finance docket or in the Carriers' application made any suggestion or gave the carrier any rights to coordinate work and employees such as is being attempted by your notice dated August 29, 1986.

It is interesting to note that the only work applied for to be done at the Raceland Car Shops at Russell, Ky. and granted by the Commission in this finance docket was that work of *manufacturing new coal hopper cars* for the Family Lines (CSX Transportation Co.) at Raceland;

and, in all other occasions where the Raceland Car Shop is mentioned, it refers only to the building of *new cars.* And, nowhere does it mention or suggest that the holding companies made application for or were granted permission to move heavy repair freight car work from any railroad belonging to the holding companies away from their home shops to the Raceland car building facility.

And, in our Item No. 5 it is clearly pointed out that although the holding companies could have applied for a wholesale merger of all the railroads included in the holding company, they did not do so; and, as pointed out in our quote from the Commission, the individual contracts on each of the individual carriers are still in force and binding upon the individual carriers.

In our Item 5 the I.C.C. has pointed out that there will be a net increase of 276 positions, the bulk of those created, 346 positions, will result from the increased production of rail carriers at Chessie Raceland Facility in Russell, Ky. This increase has been reached-and then some-by the building of new coal hopper cars for the L&N R.R. (CSX Transportation Co.). In this same quoted paragraph it was said that these anticipated changes in employee positions will occur within 6 months following final approval of the applications. We bring to your attention that the proposed move in your notice of August 29, 1986 comes some 6 years or more after the approval by the I.C.C. in this financial docket under which said notice was served.

In our Item No. 6 the carriers are now restricted from making changes such as those contained in the notice of August 29, 1986.

Due to all of the above, this will serve as notice to you that it is our position that even though we filed notice to go to arbitration on the matter in question, that since we have had the opportunity to study the above referred to finance docket and have found that there is nothing in

the Decision of the I.C.C. in Finance Docket 28905 (Sub-No. 1) that gives the carrier the right to serve their notice dated August 29, 1986 and therefore this cannot be considered a transaction under that I.C.C. docket and, therefore, the N.Y. Dock Protective Conditions do not come into play, that this is not a matter which can be arbitrated under the N.Y. Dock Agreement or any other agreement. And, that therefore, if arbitration is continued we intend to challenge the right for this matter to be brought before an arbitrator. Should you insist on continuing with the arbitration as outlined in your letter of October 15, 1986 after you receive this notice, then it will be our position that this is not a proper case for arbitration and therefore our letter to you of October 10, 1986 will be added to to make the following opening statement before the Arbitration Committee:

> "Since there is nothing in the decision of the I.C.C. in Finance Docket 28905 (Sub.-No. 1) that gives the carrier the right to serve their notice dated August 29, 1986, this is not a proper case to be before this arbitration committee, and therefore we request these matters before the arbitration committee be dismissed due to lack of jurisdiction."

Very truly yours,

/s/ L. W. McAlpine, Jr.
L. W. McALPINE, JR.
General Chairman

LWM:bjd

cc: C.E. Wheeler
R.P. Mojtowicz
R. Utter
L. A. Sutton
B. J. Crews